This I consider is a question of fact as the main complaint of the third defendant is that the receivers had failed to consider his interests when exercising the power of sale. Under such circumstances, whether the plaintiff can be held responsible for such an omission by the receivers can only be determined by oral evidence and for this very reason, I had affirmed the decision I had made earlier in chambers which was to dismiss the plaintiff's appeal with costs.

Appeal dismissed.

Solicitors: *Hisham, Sobri & Kadir; Lovelace & Hastings.*

Reported by *Ng Sheau Jiuan*

Edward Goh Geok Seng v Dunstan Dumpangol & Ors

HIGH COURT (KOTA KINABALU) – CIVIL SUIT NO K346 OF 1988
MOHAMAD NOOR J
8 NOVEMBER 1988

Civil Procedure – Order to strike out plaintiff's statement of claim – Application for – Issues to be decided in plaintiff's action were being adjudicated in two other pending suits – Whether application to strike out can succeed on this sole ground – Other factors to be looked at

In his statement of claim, the plaintiff sought certain declarations against the defendants in relation to the defendants' appointments as directors of a company in respect of which the plaintiff is also a director, and to the purported allotment of shares. Soon after filing the claims, the plaintiff applied for several orders under O 29 r 1 of the Rules of the High Court 1980, on a certificate of urgency, to restrain some of the defendants from doing certain acts in relation to the management of the company. Subsequently, the defendants filed an application for an order that the plaintiff's action be stayed and/or struck out under O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 on the ground that the plaintiff's action was an abuse of the process of court. The gist of the defendants' contention was that the questions or issues that were to be decided in the present action were being adjudicated in two other suits pending before the High Court at Kota Kinabalu, viz Suit 1419 of 1987 ('Suit 1419') and Suit 162 of 1988 ('Suit 162'). In Suit 1419, the plaintiff was the claimant whilst in Suit 162, the plaintiff was the defendant.

Held, dismissing the defendants' application:

(1) The court is satisfied that the prayers asked for and the issues raised in the plaintiff's statement of claim are substantially the same as those in Suit 1419 and Suit 162. However, this alone will not entitle the defendants to succeed.

(2) Other factors will have to be considered as well. Firstly, the suits are all pending before the same High Court though due to administrative arrangements they are to be heard before different judges. Secondly, none of the prayers and issues raised in the suits have been determined on their merits. Thirdly, the suits are capable of being consolidated. The suits can be consolidated to the extent that Suit 162 be ordered to stand as a counterclaim.

(3) In the final analysis, there is no improper purpose on the part of the plaintiff in filing the present action.

(4) Costs are awarded against the defendants because their application is really unnecessary. The defendants knew very well that the plaintiff's application under O 29 r 1, which was under a certificate of urgency, ought to be disposed of as soon as possible in order to preserve the status quo and yet they filed their application and insisted that it be heard first. This has not only occasioned unnecessary costs but also unnecessary delay in the proceedings.

[*Editorial Note*: The plaintiff's application under O 29 r 1 of the Rules of the High Court 1980 is reported in [1989] 2 MLJ 121. The defendants have appealed to the Supreme Court vide Civil Appeal No 561 of 1988.]

Yapp Hau Pehn for the plaintiff.
KY Sim for the defendants.

Cur Adv Vult

Mohamad Noor J: This is an application by the defendants for an order that the plaintiff's action be stayed and/or struck out under O 18 r 19 and O 92 r 4 of the Rules of the High Court 1980 on the ground that the plaintiff's action was an abuse of the process of the court. The plaintiff in his statement of claim sought, inter alia, the following orders:

(a) a declaration that the first and second defendants had ceased to be directors of the ninth defendant on certain specified dates;
(b) a declaration that the purported appointment of the sixth, seventh and eighth defendants as directors of the ninth defendant with effect from a certain specified date is null and void;
(c) a declaration that the purported allotment of certain specified number of shares to the first, second, third and fourth defendants on a certain specified date is null and void;
(d) for the first, second and sixth defendants to return a certain specified sum of money to the ninth defendant with interest thereon.

Soon after filing the said claims, the plaintiff by summons-in-chambers under O 29 r 1 applied for several orders, inter alia, to restrain some of the defendants from doing certain acts in relation to the management of the ninth defendant, its assets and property, and their purported shareholdings in the ninth defendant. The plaintiff filed a certificate of urgency for the purpose.

The case was argued in open court. I ordered the defendants' application to be argued first:

(a) the gist of the defendants' contention is that the questions or issues that are to be decided in the

present action and the plaintiff's prayers therein are now being adjudicated upon in two other suits pending before the High Court at Kota Kinabalu, viz Suit No K1419 of 1987 (hereinafter referred to as 'Suit 1419') and Suit No K162 of 1988 (hereinafter referred to as 'Suit 162');

(b) in Suit 1419, the present plaintiff is the claimant whilst the present first, second, third, fourth and ninth defendants are the defendants. The plaintiff sought, inter alia, an injunction to restrain the fourth defendant from acting as director of the ninth defendant and damages for fraud against the defendants. In that suit, the plaintiff's ownership in 5,000 shares in the ninth defendant is being disputed and the status of the fourth defendant as a director of the ninth defendant and the allegation of fraudulent conduct against the defendants are being adjudicated upon. The present status of Suit 1419 is at the close of pleadings stage;

(c) in Suit 162, the first, second and ninth defendants are the claimants whilst the plaintiff and one Joseph Wong Hin Tung are the defendants. In that suit, the claimants sought, inter alia, a declaration that all the resolutions passed at a certain meeting including a resolution purporting to change the signatories of the account of the ninth defendant with the Oriental Bank, Kota Kinabalu, are null and void; a declaration that the purported appointment of Joseph Wong Hin Tung as director of the ninth defendant on a certain specified date is null and void; an injunction to restrain the plaintiff and Joseph Wong Hin Tung from acting as directors of the ninth defendant; an injunction to restrain the plaintiff and Joseph Wong Hin Tung from dealing with the moneys of the ninth defendant with the Oriental Bank and damages for fraud. The plaintiff and Joseph Wong Hin Tung filed a counterclaim.

Prayer (a) in the first paragraph above is the same prayer that the plaintiff has prayed for in the said counterclaim. With regard to prayer (b) in the first paragraph above, the circumstances of the meetings of the board of directors, in particular, the one held on 8 February 1988, and the genuineness of its minutes are to be adjudicated upon in Suit 162. In respect of prayer (c) in the first paragraph above, it is related to the allotment of shares as reflected in the same minutes which is to be decided in Suit 162. Prayer (d) above is also being adjudicated upon in Suit 162. There are several other issues raised in the present action which are being disputed and to be decided in Suit 162, such as issues relating to the registered office of the ninth defendant, the 4,999 shares belonging to the second defendant, the meeting of 7 November 1987, the appointment of Joseph Wong Hin Tung, the sixth, seventh and eighth defendants as directors of the ninth defendant and the removal of the first and second defendants as directors of the ninth defendant. The present status of Suit 162 is at the close of pleadings stage.

I am satisfied that the same prayers have been asked for and substantially the same issues have been raised in the said suits. This alone will not entitle the defendants to succeed. Other factors will have to be considered as well. Firstly, the suits are all pending before the same High Court though due to administrative arrangement they are to be heard before different judges. Secondly, none of the prayers and issues raised in the suits have been determined on merits. Thirdly, the suits are capable of being consolidated on the grounds that the rights to relief claimed arise out of the same transaction and/or series of transactions and further by reason of the aforesaid two factors it is desirable that an order for consolidation may be made. The suits can be consolidated to the extent that Suit 162 be ordered to stand as a counterclaim. In the final analysis I am satisfied that there is no improper purpose on the part of the plaintiff in filing the present action. Therefore, I cannot see how any question of abuse of the process of the court can be said to arise. Hence, the following orders are made:

(i) the defendants' application is dismissed with costs;
(ii) the defendants are at liberty to file their defence within 14 days from today;
(iii) the plaintiff has to apply for consolidation.

Costs are awarded against the defendants because, in my view, having regard to what I have said in para 4 above, their application is really unnecessary. The defendants' counsel knew very well that the plaintiff's application under O 29 r 1, which was under a certificate of urgency, ought to be disposed of as soon as possible in order to preserve the status quo and yet he filed the defendants' application and insisted that the application be heard first. Hence, his conduct has not only occasioned unnecessary costs but also unnecessary delay in the proceedings.

Application dismissed.

Solicitors: *Wong Yapp Chung & Co*; *Yong & Chia Co.*

Reported by *Ng Sheau Jiuan*